# ON BALANCE: GUIDING PRINCIPLES FOR ADMINISTRATIVE JUSTICE REFORM IN BRITISH COLUMBIA– Comments and Submission Concerning the White Paper prepared by the Administrative Justice Project, Ministry of the Attorney General, Province of British Columbia by the Office of the Ombudsman

by

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In July of this year, the White Paper, "On Balance: Guiding Principles for Administrative Justice Reform in British Columbia", was released. It was intended to articulate a vision for administrative justice reform through an analysis of a number of key issues and through making a variety of recommendations with respect to those issues. Independence, accountability, appointments, statutory powers for tribunals, dispute resolution, Charter jurisdiction and standard of review were among the key issues with which the paper dealt. The paper raises many interesting questions and provides as many interesting answers.

The paper was produced in the context of the Government's overall Core Services Review which itself reviewed mandates and service delivery mechanisms and practices of all of government. Some of the assumptions of the core review bear considerable analysis which is beyond the scope of this brief paper. This paper will focus on some aspects of the White Paper's assumptions, analysis and recommendations about the administrative justice system.

*General Comments*

The paper takes a narrow, restricted view of the administrative justice system. It is too narrowly focused on what it sees as "provincial tribunals" and avoids dealing with a panoply of decision making bodies which have their origin in provincial legislation or are permitted by it but are not necessarily controlled through provincial budgeting. Among these are licensing and disciplinary bodies within professional colleges, licensing, planning and property related boards within local governments and decision making entities such as school boards, hospitals and health boards which operate at local and regional levels. It is easy to be critical of something like this and our Office is mindful of the extraordinary difficulty of analyzing the whole of the administrative justice system. Having said this and given the parameters of the White Paper, no one ought to expect that the whole administrative justice system will be reformed by the proposals. To be sure elements of it will but the paper conveys an impression of change which cannot happen because of its parameters. Beyond this, without analysis of the whole of the system, can we be sure that there is the right focus on what needs to be reformed?

The paper is also narrow in that it only sees courts as the focus of seeking review of tribunal practices and decisions. It does not deal with bodies such as our Office or the Information and Privacy Commissioner or the Police Complaints Commissioner. In not acknowledging our Office, it misses an opportunity to analyze and promote what has been an important, informal, effective and inexpensive mechanism for reviewing tribunals. We have raised this matter in

previous submissions to the Project. We understand that this omission may be because it is assumed that the Ombudsman's Office is part of the current justice system and will be retained as such. Current budget proposals made by the legislature's Select Standing Committee on Finance and Government Services, if adopted, will severely limit the comprehensive remedy now provided by the Office of the Ombudsman.

*Specific Comments*

Vision[1]

A vision for the administrative justice system is articulated on p.ii of the paper. The goals of providing high quality services to the people and achieving the "right" balance between accountability are clearly important and indeed laudable. The vision that the system should reflect "government's" core values and principles may be too narrow. Any justice system must strive to reflect society's core values and ideals of justice. This is not just semantics as much of the paper reflects an approach which would have the justice system fashioned to suit specific government's goals rather than serving the interests of justice understood in a broad and social sense.

Most of the specific goals in the vision are also clearly important and are also praiseworthy. Each part of the vision could be seen in a variety of ways and it is really in legislation and action that its full import and impact will be appreciated.

The notion of efficiency in the vision reflects a common government theme. The government seems to want certainty and finality and one senses that this is a major goal of the review process. The interplay of justice and efficiency is not fully explored in the vision or the paper. Economy looms large though throughout the paper and expediency in the face of restricted resources emerges as a critical constraint. Efficiency is not defined in human terms or human costs or in terms of justice itself. This is narrow and unfortunate.

One specific part of the vision which is of considerable importance to this Office is the inclusion of some deference to providing written reasons for decisions "where appropriate and in the public interest". Reasons are critical in achieving understanding of and justice within public administration.

Core Services Review

The paper outlines what the Administrative Justice Project has done and it also describes the Core Services Review[2]. One aspect of the Core Services Review was the Mandate Review which bears brief comment[3]. The Mandate Review looked at whether or not there was a "compelling public interest" in maintaining each tribunal, whether or not the tribunal costs were "affordable in the current fiscal environment" and whether or not there was a "legitimate and essential role

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[1] *On Balance: Guiding principles for Administrative Justice Reform in British Columbia*, 2002, p.ii.
[2] Ibid., pp.2 to 9.
[3] Ibid. p.7.

for the public sector in the field in which the ...tribunal operates". In terms of service delivery, efficiency and accountability were seen as tests. What is meant by "compelling public interest", "affordability" and "efficiency" needs more elaboration and how to apply such concepts needs more clarification.

Independence and Accountability

The paper acknowledges the importance of independence while noting that tribunals are also about implementing public policy[4]. Among the recommendations are that government adopt guiding principles which recognize the importance of these concepts. In respect to accountability it recommends that "the adoption of modern and innovative management practices" be part of the principle of accountability. These latter terms are not defined. Modernity is not necessarily the same thing as accountability.

The paper indicates that independence can be reinforced by formalizing relationships between government and tribunals through legislation and making agreements and by establishing standard terms and conditions of appointment[5]. This seems worthwhile although the use of agreements rather than legislative means may ultimately be problematic. The power of legitimacy of legislative requirements ought not to be underestimated. Indeed, one interesting and positive recommendation in the paper is that public confidence in tribunals should not be eroded or undermined "through unnecessary or inappropriate government interference in tribunal operations"[6].

Appointments

There is much in the paper about the appointment process[7]. This is an important area to be seeking change. The paper calls for clarifying how appointments are to be made, who has the power to make such appointments, tribunals to engage in needs assessment and recruitment in open and understandable processes. Such processes would be monitored by the "Board Resourcing and Development Office"[8]. This process is not discussed except in other recommendations which indicate the Board will supervise standards regarding appointments.

In respect to appointments the paper calls for the end of at pleasure appointments and the establishment of fixed terms although it also says there should be flexibility regarding hiring by the chair of tribunals (e.g. re duration of employment). The interplay of the idea of fixing terms and enhancing independence has to be analyzed and understood in terms of the desire for flexibility. Each may harm the other although the potential loss of genuine independence through keeping people employed on short term contracts will

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[4] Ibid., p.11.
[5] Ibid., p.11.
[6] Ibid., p.11.
[7] Ibid., pp.12-16.
[8] Ibid., p.14.

likely be a greater problem for attaining justice than loss of flexibility through giving longer, fixed terms.

Statutory Powers for Tribunals

With respect to statutory powers for tribunals the paper recommends developing a policy document entitled "Model Statutory Powers Provisions for Administrative Tribunals"[9]. The purpose would be to assist the Attorney General and the tribunals analyze what powers are needed. Each tribunal would be analyzed on an individual basis. In relation to this, the paper recommends establishing an advisory body as well as "a central review mechanism" to "ensure consistency in tribunal powers and procedures[10]. Although vague, this idea appears worthwhile. It is however not a substitute for a statutory powers and procedures act which might have more force.

Dispute Resolution[11]

The paper calls for tribunals to identify "opportunities" for 'ADR' and calls for amendment of the governing statutes of tribunals to enable them to take the opportunity of using 'ADR'. A troubling aspect of this is that there is a limited conception of alternate dispute resolution. It does not deal with arbitral models and as noted above does not deal with institutions such as the Ombudsman. Ombudsman, for example, is a form of dispute resolution but relies on investigation and insight rather than mediation. One way of enhancing the role of the Ombudsman for tribunals would be to amend their governing legislation to enable tribunals to reconsider decisions on the basis of Ombudsman recommendations.

Charter Jurisdiction[12]

The critical concern in the paper here is which tribunals should consider Charter challenges. Tribunals, it argues, should have to have express provision to consider challenges to their governing legislation. This makes sense generally. What is not dealt with is the importance of Charter jurisprudence in tribunal decision making per se. Tribunals need to be cognizant of Charter principles in doing their work.

Standard of Review

The paper recommends that there be a Statutory Appeals Procedure Act which would "provide a uniform procedure for statutory appeals to court" [13]. It also calls for policy guidelines as to whether a tribunal's decision should be subject to statutory appeal or only judicial review and that there should be an analysis or tribunal by tribunal basis regarding privative clauses[14]. It also calls for clear

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[9] Ibid., p.17.
[10] Ibid., p.18.
[11] Ibid. pp. 18 to 20.
[12] Ibid., pp. 22, 23.
[13] Ibid., p.26.
[14] Ibid., p.26.

legislation on where correctness as a standard of review is to be applied[15]. Given its current state, legislation in the area of standard of review could help clarify the law in this area.

Operating Agreements

The paper calls on government to update the model Memorandum of Understanding to give effect to government's strategic plan[16]. The agreements would do such things as assign express responsibility for ensuring that the tribunal achieves its purposes, defining the role of the tribunal as it relates to government's functions and the like. This is troubling as one would have assumed that much of what is dealt with in the paper's recommendations [17]. would be dealt with in legislation. Government should not encourage overriding or undermining legislation through use of agreements or MoUs.

Tribunal Governance

The paper deals with developing an organizational model for Tribunal Governance[18]. Here the paper stresses the importance of the tribunal chairs and notes that they must have full statutory authority to carry out their duties[19]. The paper though recommends that the "host ministry model" be retained for tribunals although it calls for the reduction of host ministries. The oversight role of a host ministry needs to be carefully evaluated in terms of encouraging or discouraging independence.

Implementation

The Administrative Justice Office proposed in the paper is important for implementation as it would have a lead role in following up on white paper recommendations[20]. It would have a two year mandate which given the ambitious agenda proposed in the paper is not likely long enough. It is to be hoped that such an Office will be given sufficient resources and support.

*Conclusion*

The white paper presents many interesting ideas and recommendations. Much of its substance rests on trade offs of which the government and public should both be equally wary. Efficiency has many facets and those which encourage the attainment of justice for all should be seen to be of greatest concern.

[***Signed by GJL***] **January 17, 2003**

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Date

[15] Ibid., p.26.
[16] Ibid., p.29.
[17] Eg. see Recommendation 46 which deals with such things as defining the role of the tribunal.
[18] Ibid., pp. 30 to 33.
[19] Ibid. p. 32.
[20] Ibid. p. 35.